

**UNITED STATES DEPARTMENT OF LABOR  
BOARD OF ALIEN LABOR CERTIFICATION APPEALS  
800 K STREET, NW, SUITE 400-N  
WASHINGTON, D.C. 20001-8002**

Date: January 28, 1998  
Case No.: 97-INA-464

*In the Matter of:*

**FILIBERTO'S MEXICAN RESTAURANT,**  
Employer,

*On Behalf of:*

**JUAN QUINTERO-URIBE,**  
Alien.

BEFORE: Burke, Guill, Vittone  
Administrative Law Judges

**DECISION AND ORDER**

***Per curiam*** This case arises from an application for labor certification<sup>1</sup> for the position of Cook. The Certifying Officer (CO) proposed in a Notice of Findings (NOF) that it would deny certification because Employer "failed to document that there are no unlawful terms or conditions of employment, that the job is bona fide, and that there is a clear opening for a U.S. worker." (AF 76-81). In the NOF, the CO instructed Employer how it could rebut the findings therein, *to wit*,

- Document what Alien has been paid since June 1992, including federal and state payroll tax returns, or amendments thereto;
- Documentation establishing Employer's ability to pay the wages offered, including tax returns and/or certified financial statements, and a copy of the firm's business license;
- Evidence that Employer would replace Alien with a U.S. worker, including evidence of the relationship between Alien and Employer, that Employer is a sole proprietorship, partnership or corporation including names and titles of all owners, ownership interest of Alien in Employer, relationship between Alien and any other owner.

*Id.* The NOF also informed Employer that:

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<sup>1</sup> Alien labor certification is governed by 8 U.S.C. §1182(a)(5)(A) and 29 C.F.R. Part 656.

All deficiencies must be corrected or rebutted by [May 8, 1996]. If additional time is needed, an extension request must be submitted by the employer IN WRITING to this office . . . The request must be postmarked no later than the rebuttal due date. An extension request will be granted only if extenuating circumstances are cited by the employer; extensions are not automatically granted.

(AF 9 emphasis in original).

By letter dated April 26, 1996, Employer, by and through its representative, filed a request for extension of time until June 4, 1996 (AF 76). Employer cited the “considerable work that must be done with respect to the rebuttal to the Notice of Findings” as a reason for needing the extension. *Id.* The CO denied the request on May 17, 1996 (AF 75). Thereafter, Employer submitted a request for reconsideration on May 21, 1996 (AF 4-5) and its rebuttal documentation (AF 6-74). On June 28, 1996, the CO issued a denial based on untimely rebuttal (AF 3). Employer then requested administrative review on June 12, 1996, and the file was forwarded to this Office (AF 1).

In its request for reconsideration, Employer expanded on its reasons for needing the extension. Employer pointed out that the NOF was for five individual applications, each with multiple rebuttal issues. Further, Employer stated that because the rebuttal period was during tax season, and because its rebuttal had “serious potential tax consequences,” it needed to consult its accountant, who was unavailable until the first of May. On June 28, 1996, the CO wrote to Employer stating that it failed to rebut the NOF timely, and that the NOF automatically became the Final Determination of the Secretary.<sup>2</sup> (AF 3). The CO never responded to Employer’s request for reconsideration.

In response to our Notice of Docketing, Employer filed a motion on September 2, 1997, to remand the matter to the Certifying Officer.

### **DISCUSSION**

The CO exercises discretion in deciding whether to grant an employer’s request for an extension of time to file rebuttal. Such requests should be granted where a showing of good cause or extenuating circumstances is made. They are not automatically granted. However, where the employer did not have a prior opportunity to present evidence to support its position, it is an abuse of discretion for the CO not to reconsider. ***Harry Tancredi***, 88-INA-441 (Dec. 1, 1988) (*en banc*). The deadline for filing rebuttal is not tolled while the CO is considering a request for extension of time, but before the CO rules on the request. See ***San Bernardino County Superintendent of Schools***, 94-INA-175 (Apr. 21, 1994). Further, employers have an obligation to check with the CO regarding the status of its request -- thus, an employer cannot assume that a request for an extension has been granted. ***West Virginia Univ.***, 93-INA-198 (May 24, 1994).

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<sup>2</sup> This letter, in effect, was the CO’s Final Determination.

The Board has held that it is an abuse of discretion to deny an extension request where an employer timely notifies the CO that its corrective action cannot be completed within the 35-day rebuttal period. *Alabama Reweaving*, 88-INA-294 (June 2, 1989). Employer's request for an extension of time to file rebuttal was filed within the rebuttal period; i.e., twelve days before rebuttal was due, however, the CO's answer to Employer's motion was dated after the rebuttal period (AF 75). The reason set forth by Employer for needing the extension was the "considerable work that must be done with respect to the rebuttal to the Notice of Findings." (AF 6). Although this reason for requesting the extension may not, in itself, constitute an "extenuating circumstance," the CO's actions were arbitrary. She did not timely respond to Employer's motion. Moreover, prior to issuing a final determination letter, she was in receipt of both Employer's rebuttal and its motion for reconsideration which explained more fully the rationale for the extension request.

Considering the nature of the deficiencies cited, Employer's inability to consult with its accountant constitutes an extenuating circumstance, such that the CO abused her discretion in not granting Employer's request for reconsideration of its request for an extension of time. See *Star Image Productions, Inc.*, 91-INA-182 (July 28, 1992).<sup>3</sup>

### **ORDER**

Accordingly, it is **ORDERED** that the denial of labor certification is **VACATED** and the case is **REMANDED** to the CO with instructions to reopen the record and allow Employer a reasonable time in which to submit its rebuttal to the NOF. Thereafter, the CO shall consider all the evidence submitted to determine if labor certification should be granted or denied.

SO ORDERED.

Entered at the direction of the Panel:

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TODD R. SMYTH  
Secretary to the Board of  
Alien Labor Certification Appeals

TRS/jlh

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is

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<sup>3</sup> This decision is not effected by the fact that the CO did not timely respond to Employer's motion for an extension of time. In this instance, such a denial would still have been an abuse of discretion.

necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET  
PER CURIAM DECISION

Case Name: Filiberto's Mexican Restaurant (Juan Quintero-Uribe, Alien)

Case No. : 97-INA-464

Title: Decision and Order

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Vittone			
Burke			

Comments: \_\_\_\_\_  
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Writer: jlh